FLRC No. 75A-45

American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator). The arbitrator determined that the agency had cause to discipline the grievant, but concluded that the penalty, a written reprimand which was to be retained in the grievant's official personnel folder for a period of 2 years, was too severe; and directed that retention of the reprimand be reduced to 1 year. The agency filed exceptions to the award with the Council, principally contending that the award violated an agency regulation. The agency also requested a stay of the arbitrator's award.

Council action (December 24, 1975). The Council concluded that, under the facts of this case and the relevant scope of the term "appropriate regulation" in section 2411.32 of the Council's rules, the agency's exceptions did not present a ground upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 24, 1975

Mr. Robert T. McLean, Chief
Labor & Employee Relations Division
Directorate of Civilian Personnel
Headquarters U.S. Air Force
Department of the Air Force
Washington, D.C. 20314

Re: American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45

Dear Mr. McLean:

The Council has carefully considered your petition for review of an arbitrator's award filed in the above-entitled case.

As stated in the award, the agency issued a written reprimand to the grievant for failing, for the second time within 6 weeks, to use proper eye protection devices while operating a grinding machine as required by the agency's safety regulations in Air Force Manual 127-101. The grievant had been counseled regarding proper eye protection following the first incident. The written reprimand was to be recorded in the grievant's official personnel folder for a period of 2 years. Thereafter, the employee filed a grievance seeking to have the reprimand rescinded. The grievance was ultimately submitted to arbitration.

The parties submitted the following issue to the arbitrator:

> Was the reprimand given the Grievant, Dante Di Pietra, for just cause and administered in a fair and equitable manner under Article 25, Section 1.[1/] If not, what should the remedy be? [Footnote added.]

1/ Section 1 of Article 25 (DISCIPLINARY ACTIONS) of the parties' collective bargaining agreement provides as follows:

> Disciplinary actions will be based on just cause, initiated promptly and administered in a fair and equitable manner.

The arbitrator determined that the agency had cause to discipline the grievant for his second violation of safety regulations. However, the arbitrator concluded that the penalty was too severe for two reasons. First, the grievant's initial violation of the safety regulations was the result of an unintentional mental lapse, the nature of which management itself recognized as slight. Second, the subsequent violation alone did not constitute sufficient grounds to warrant a written reprimand of 2 years' duration "as defined in Air Force Regulation 40-750," which agency regulation had been introduced as a joint exhibit in the arbitration proceeding. Therefore, the arbitrator ordered the duration of the written reprimand reduced to 1 year.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of three exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

The agency's first exception contends that the arbitrator's award, by reducing the duration of the reprimand to 1 year, violates "applicable regulation,"[2/] specifically paragraphs 15(b)[3/] and 19(b)[4/] of Air Force Regulation (AFR) 40-750 which provide that the retention period for a reprimand is 2 years.

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2/ The Council's rules concerning review of arbitration awards provide for the granting of review on grounds that the award violates "appropriate regulation." The Council has construed the agency's petition as alleging a violation of an "appropriate regulation."

3/ Paragraph 15b of AFR 40-750 provides as follows:

> b. Reprimands are temporary records whose retention period is 2 years from the date of the notice of decision to reprimand. Expired reprimands are screened from official personnel folders and are destroyed. References to expired reprimands are deleted from AF Forms 971. The notice of decision to reprimand informs the employee of the expiration date of the reprimand and that the reprimand will be destroyed upon expiration.

4/ Paragraph 19b of AFR 40-750 provides in pertinent part as follows:

> b. Reprimand. A reprimand is a disciplinary action which is temporarily recorded in the employee's Official Personnel Folder for 2 years.
>
> (1) It is used for significant misconduct and repeated lesser infractions and to motivate improved performance when the cause of the inadequate performance is within the employee's control.



(Continued)

The agency asserts that the reprimand of the grievant was issued under the policy and provisions of AFR 40-750, paragraph 19 of which defines the agency disciplinary structure; that agency policies and requirements must be applied unless waived in the agreement but there was no waiver in the case herein; and that paragraph 19(b)(3) of AFR 40-750 provides for making a reprimand more but not less severe. The agency argues that the arbitrator by reducing the retention period to 1 year substituted his personal belief as to what constitutes an appropriate retention period for the 2-year period defined in paragraphs 15b and 19b of AFR 40-750 and, therefore, his award violates those paragraphs of AFR 40-750.

In its second exception the agency contends that the award is not based on provisions of the agreement which make it clear that "Air Force policies and requirements must be applied unless they are waived in the agreement." In support of this exception the agency points out that although the arbitrator had a copy of AFR 40-750 before him and, in fact, quoted paragraph 19b(2) of that regulation, he cited neither an agreement provision nor a regulatory provision giving him authority to render an award reducing the period of the reprimand and no such authority exists in the agreement. Thus, in effect, the agency contends that the arbitrator exceeded his authority by fashioning a remedy contrary to AFR 40-750.

The agency's third exception is that the arbitrator exceeded his authority by, in effect, altering the agreement. The agency contends that the arbitrator's award effectively alters the provisions of Article 3, Section 1

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(Continued)

> (2) The reprimand is a severe disciplinary action which should be adequate for most disciplinary situations which require an action more stringent than an oral admonishment. For purposes of determining the existence of a prior offense in support of the penalty to be established for a subsequent offense, a reprimand has the same weight as a suspension.
>
> (3) A reprimand may be made more "severe" in the sense of establishing a progression of penalties by including reference to previous offenses, indication of the seriousness of management's concern with the continued misconduct or delinquency, and progressively more rigorous statements that a future offense could result in a more severe penalty. A reprimand may be the last step in a progression before removal if it gives clear warning that a further offense could lead to removal.

and Article 25, Section 1 of the agreement.[5] If the award is sustained, the agency contends, Article 3, Section 1 will effectively read ". . . by published agency policies and regulations in existence at the time the agreement was approved except when an arbitrator chooses otherwise . . .," and Article 25, Section 1 will effectively read "[d]isciplinary actions as defined by the arbitrator after the fact. . . ."

In essence, each of the agency's three separately stated exceptions are based upon the contention that the award violates an agency regulation by reducing the letter of reprimand from 2 to 1 year's duration.[6] The predicate of the agency's exceptions is that, in the circumstances of this case, AFR 40-750 — an agency regulation — is an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules; hence, an award inconsistent with the agency regulation herein is violative of an appropriate regulation and, therefore, should be set aside.

As previously indicated, the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates an appropriate regulation. Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (May 19, 1975), Report No. 70 at p. 4 of the digest. The question, then, is whether or not the Air Force regulation at issue is, in the circumstances of this case, an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules such that the Council will, if the facts and circumstances described in the petition warrant it, grant a petition for review of the award.

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5/ Article 3, Section 1 of the agreement provides as follows:

> Section 1. In the administration of all matters covered by this agreement, officials and employees are governed by the provisions of any existing or future laws and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

Article 25, Section 1 provides:

> Section 1. Disciplinary actions will be based on just cause, initiated promptly and administered in a fair and equitable manner.

6/ In the alternative, the second and third exceptions could be read as challenging the award on the ground that the arbitrator exceeded his authority in fashioning his remedy. See note 12, infra.

In cases to date in which the Council has accepted and subsequently modified an arbitrator's award based in part on a violation of an "appropriate regulation," the regulations at issue were Civil Service Commission regulations implementing specific provisions of title 5, United States Code.[7] In American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61, the union contended in its petition for Council review that the award violated an agency staff manual and therefore violated an "appropriate regulation." However, the Council, without passing on whether the agency staff manual is an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules, concluded that the union's exception did not appear to be supported by the facts and circumstances described in the petition. (In other cases[8] the Council has held that the interpretation of contract provisions, including the interpretation of agency policies and regulations on matters within agency discretion where those policies or regulations are specifically incorporated in a negotiated agreement, are matters to be left to the judgment of the arbitrator. Hence, a challenge to the arbitrator's interpretation of such agency policies or regulations on the ground that the arbitrator misinterpreted and therefore violated such regulations, does not present a ground upon which the Council will grant a petition for review of an arbitration award.)

Thus, where the Council has accepted a petition for review of an arbitrator's award on the ground that it violates an appropriate regulation, the appeal has involved a regulation issued by an authority outside the agency. The question in this case, on the other hand,

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7/ E.g., American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator), FLRC No. 73A-51 (September 24, 1974), Report No. 57, wherein the Council found, based upon the advice of the Civil Service Commission, that the award, to the extent that it directed a retroactive promotion and backpay, violated applicable law and appropriate regulation.

8/ Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78; Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator), FLRC No. 75A-9 (July 24, 1975), Report No. 78; Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Eigenbrod, Arbitrator), FLRC No. 75A-15 (July 24, 1975), Report No. 78; Federal Aviation Administration, Kansas City, Missouri and Professional Air Traffic Controllers Organization (Yarowsky, Arbitrator), FLRC No. 75A-54 (July 24, 1975), Report No. 78.

involves circumstances where an arbitrator, in interpreting and applying a contract provision, renders an award which the agency says is in violation of an agency regulation which deals with the same subject and which was submitted by the parties for consideration by the arbitrator in fashioning his award. While it is recognized that under section 12(a) of the Order an agency's regulations are binding in the administration of a negotiated agreement,[9] the Council is of the opinion that where, as in this case, an arbitrator, in the course of rendering his award, considers an agency regulation which deals with the same subject matter as the provision in the negotiated agreement and which was introduced by the parties to the dispute, and thereafter considers and applies that regulation in reaching his judgment in the case, the agency may not challenge the application of that regulation before the Council.[10]

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9/ Section 12(a) provides:

> (a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;

In Bureau of Prisons and Federal Prison Industries, Inc., Washington, D.C. and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74, the Council cited from the Report accompanying the 1975 amendments to E.O. 11491 as follows:

> . . . arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation. [Report No. 74 at p. 13.]

10/ This conclusion is consistent with the recent amendments made to section 13 of the Order by Executive Order 11838, February 6, 1975. Under the provisions of that section the parties to an agreement may now agree to resolve grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, through their negotiated grievance procedure.

As to the facts of this particular case, the arbitrator was empowered by the parties to determine whether or not the reprimand was for just cause and administered in a fair and equitable manner, and, if not, what the remedy should be. As the Council has indicated, an arbitrator derives his authority from both the collective bargaining agreement and the submission agreement.11/ Here, the award shows that the issue submitted by the parties authorized the arbitrator to decide "what should the remedy be" if he determined that the reprimand was not for "just cause and administered in a fair and equitable manner" under Article 25, Section 1 of the agreement. The arbitrator determined in essence that while the reprimand was for cause, the reprimand was not administered in a fair and equitable manner and he ordered the penalty reduced to be commensurate with the offense. In so doing, the arbitrator did precisely what the parties commissioned him to do. That is, he answered the question submitted: "What should the remedy be?"

In finding that the penalty did not "fit the offense committed," the arbitrator specifically mentioned and quoted from AFR 40-750, submitted by the parties as a joint exhibit, and stated that the violation did not warrant a written reprimand of 2 year's duration as defined therein. In reducing the reprimand to 1 year's duration the arbitrator was, under the provisions of Section 1 of Article 25 of the collective bargaining agreement and the submission agreement, in effect, considering and applying the agency's regulations and imposing the penalty of reprimand in a manner which he deemed appropriate for the offense committed. In conclusion, under the facts of this case and in accordance with the discussion herein regarding the scope of the term "appropriate regulation" in the Council's rules, the agency's exceptions that the arbitrator's award violates an agency regulation do not present a ground upon which the Council will grant a petition for review of an arbitration award.12/

11/ See American Federation of Government Employees, Local 12 (AFGE), and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42, n. 12 and accompanying text.

12/ Likewise, should the second and third exceptions be viewed as challenging the award on the ground that the arbitrator exceeded his authority in fashioning his remedy, the Council must conclude, for the reasons discussed above concerning the facts of this particular case, that the agency's exceptions are not supported by facts and circumstances as required by section 2411.32 of the Council's rules of procedure. See Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78, citing Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56. See note 6, supra.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the request for a stay is denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: J. W. Mulholland
AFGE

James A. Gross